

**MARK S. BAUER**

V.

**TIEHEN MAINTENANCE, INC.**

AND

**DEPOSITORS INSURANCE COMPANY**

Docket No. 1,059,483

## STATEMENT OF THE CASE

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 6, 2015, preliminary hearing and exhibits thereto; the transcript of the March 3, 2015, preliminary hearing; the transcript of the August 10, 2015, deposition of Dr. Prem Parmar and exhibits thereto; and all pleadings contained in the administrative file. The undersigned Board Member also considered Dr. Vito J. Carabetta's July 25, 2012, court-ordered independent medical evaluation (IME) report.

The ALJ granted claimant's request for a third right wrist surgery and temporary total disability benefits (TTD). The ALJ also ordered respondent to pay Dr. Lynn D. Ketchum's evaluation expenses as unauthorized medical benefits.

Respondent appeals, contending claimant's accident was not the prevailing factor causing his injury and need for surgery and claimant's preexisting right wrist condition was solely aggravated by his accident. Respondent asserts claimant agreed that \$500 in unauthorized medical benefits would be paid for Dr. Regina M. Nouhan's evaluation and that a payment had been sent to Dr. Nouhan. Respondent asserts the issue of

unauthorized medical expenses was not discussed at the October 6, 2015, preliminary hearing.

Claimant argues the Board does not have jurisdiction to review the ALJ's award of TTD. Claimant submits he does not expect to be paid twice for unauthorized medical expenses. Finally, claimant asks the Board to affirm the preliminary hearing Order finding granting his request for a third right wrist surgery.

The issues are:

1. Should respondent be required to provide claimant with additional right wrist surgery?
2. Is claimant entitled to TTD?
3. Is claimant entitled to \$500 in unauthorized medical expenses for Dr. Ketchum's evaluation?

#### **FINDINGS OF FACT**

Claimant maintained respondent's properties, including performing carpentry work. On July 5, 2011, claimant was on a deck painting an eave that extended beyond the deck when he lost his balance and fell 14 feet, bouncing on a fence and landing on both fists backwards. Claimant injured both shoulders and wrists and hit his rib cage on the fence. Claimant underwent surgery on November 11, 2011, for removal of a right dorsal wrist ganglion cyst. Approximately two and one-half weeks later, claimant received additional surgery to address a right wrist seroma. Both surgeries were performed by Dr. Regina M. Nouhan. Claimant wants a third right wrist surgery recommended by Dr. Prem Parmar.

For his right wrist injury, claimant was treated or evaluated by six physicians whose records are in evidence.

#### **Dr. Brian Divelbiss**

Dr. Divelbiss saw claimant for his right wrist injury on August 23, 2011. Apparently, Dr. Divelbiss saw claimant previously, because the doctor indicated he was performing a recheck for a fall off a balcony. The notes from the visit do not mention a preexisting right wrist condition. The doctor's impression was right wrist pain following a fall onto outstretched left hand.

**Dr. Regina M. Nouhan**

Dr. Nouhan first saw claimant on August 31, 2011, and he reported injuring his wrists when falling off a balcony. Claimant reported wanting a second opinion because Dr. Divelbiss indicated claimant's right wrist condition preexisted his fall and the fall caused nothing new. Dr. Nouhan reviewed x-rays taken one week after claimant's fall and noted they showed arthritic changes.<sup>1</sup> Because the x-rays showed arthritic changes, Dr. Nouhan indicated she agreed with Dr. Divelbiss that claimant's arthritic changes were not likely caused by his work accident. Dr. Nouhan indicated it was "quite reasonable that the fall has aggravated this problem and made it more symptomatic. Certainly the tendinitis/soft tissue swelling over the dorsal radial aspect of the right wrist is likely to be related to this injury and not necessarily pre-existing."<sup>2</sup> The doctor was suspicious claimant might have a right wrist SL ligament tear.

On October 12, 2011, Dr. Nouhan aspirated claimant's right wrist ganglion. The doctor noted she and claimant discussed possible future treatment for his ligament tear and degenerative arthritic wrist problems. She performed surgery on November 11, 2011, to excise the right wrist ganglion cyst, gave claimant a corticosteroid injection and noted claimant had a likely preexisting scapholunate ligament separation with some associated arthritis. Claimant was released at maximum medical improvement (MMI) by Dr. Nouhan on January 24, 2012.

**Dr. Vito J. Carabetta**

The ALJ ordered Dr. Carabetta to evaluate claimant for his bilateral wrist and shoulder injuries and render an opinion on claimant's functional impairment. The ALJ's Order instructed Dr. Carabetta not to provide a causation opinion or restrictions. The doctor's July 25, 2012, IME report does not mention claimant had preexisting right wrist arthritis, nor the opinions of Drs. Divelbiss and Nouhan concerning causation. However, Dr. Carabetta's report does provide some insight.

Claimant provided a history to Dr. Carabetta of falling off a balcony from a height of 14 feet and that the bulk of the impact was absorbed by his right wrist. Dr. Carabetta noted a September 16, 2011, right wrist MRI demonstrated a ligamentous injury. The doctor noted the only past medical problem claimant had was hypertension. No congenital factors that might have a bearing on claimant's present medical condition were reported.

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<sup>1</sup> The doctor indicated the right wrist x-rays showed a slight SL widening with some degree of DISI deformity.

<sup>2</sup> P.H. Trans. (Oct. 6, 2015), Resp. Ex. B.

**Dr. Paul F. Nassab**

On April 14, 2014, claimant saw Dr. Nassab. According to Dr. Nassab, claimant injured his right wrist on July 5, 2011, when he fell off his deck while painting his house. The doctor diagnosed claimant with a right SLAC<sup>3</sup> wrist with severe degenerative changes. Dr. Nassab stated he was waiting on radiographs of claimant's injury. On June 23, 2014, after reviewing the aforementioned radiographs, Dr. Nassab opined, "I do not believe that the injury is the prevailing factor in the injury as it was pre-existing."<sup>4</sup>

**Dr. Lynn D. Ketchum**

At the request of his attorney, claimant was evaluated by Dr. Ketchum on September 24, 2014. Claimant provided a similar history of his work accident that he provided to Dr. Carabetta. Dr. Ketchum took x-rays that showed advanced scapholunate collapse of both wrists.

Dr. Ketchum did not review x-rays taken approximately one week after claimant's fall. However, he was aware Drs. Divelbiss and Nassab, based upon the aforementioned x-rays showing arthritis, did not think claimant's right wrist injury was work related. Dr. Ketchum indicated claimant's fall approximately 15 feet onto his wrists was enough of a mechanism to cause scapholunate separation to the degree he had. The doctor diagnosed claimant with advanced scapholunate collapse of both wrists, right worse than left, with the capitate descending toward the radius. Dr. Ketchum opined claimant needs a proximal row carpectomy and the prevailing factor causing claimant's scapholunate collapse and his need for treatment bilaterally was his work accident.

**Dr. Prem Parmar**

Pursuant to ALJ Howard's Order, claimant was evaluated by Dr. Parmar on April 13, 2015. Claimant provided a similar history of injury that he provided Drs. Carabetta and Ketchum. According to Dr. Parmar, claimant stated he had no issues with his right wrist prior to his 2011 work accident. In addition to taking a history, Dr. Parmar physically examined claimant and reviewed his extensive medical records, including records of the five physicians discussed above.

Dr. Parmar testified claimant had an asymptomatic preexisting underlying right SLAC wrist that was aggravated and made symptomatic by his work accident. The doctor explained that when a person has an injury, his or her asymptomatic condition can become

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<sup>3</sup> Dr. Parmar testified that a SLAC wrist is scapholunate advanced collapse, a common arthrosis where a person develops radial sided arthritis because of disease of the lunate bone or a previous history of wrist sprain or fracture to the scaphoid, avascular necrosis or subluxation of the scaphoid.

<sup>4</sup> P.H. Trans. (Oct. 6, 2015), Resp. Ex. C.

aggravated and he or she has pain. He indicated the disease is aggravated or worsened. In claimant's case, he had swelling and developed a ganglion cyst that was not present before the accident, but came after the accident. Dr. Parmar indicated claimant's right SLAC wrist was not significantly altered structurally from his fall, but symptomatically it was a different story.

When asked if claimant's accident caused a change in the physical structure of the right wrist, Dr. Parmar indicated claimant may have an undisplaced capitate fracture. The doctor was also asked if claimant may have damaged some of the support structure of the wrist in the fall that would cause it to become symptomatic. Dr. Parmar replied, "[y]eah, I think that's part of the aggravation of the preexisting condition so it's possible, absolutely, and I think he actually tore probably some capsule which caused the ganglion."<sup>5</sup>

Dr. Parmar recommended surgical treatment, a proximal row carpectomy,<sup>6</sup> for claimant's advanced right SLAC wrist. An alternative surgery would be to excise the scaphoid and fuse some of the remaining bones in a four-corner fusion. The doctor agreed the purpose of surgery is to reduce pain that claimant did not have before his fall. Dr. Parmar did not know if or when claimant would have needed the surgery if he had not fallen.

In his report, Dr. Parmar gave three opinions. One of those opinions was that the surgery he recommended was to treat claimant's preexisting diseased right wrist. The doctor indicated claimant had "residual issues that he has been dealing with since the surgery and indeed some of these issues were prior to surgery are due to a direct result of the significant disease that he had in his wrist prior to his fall."<sup>7</sup> Dr. Parmar stated claimant's work accident aggravated his preexisting condition. As noted above, the doctor indicated claimant's ganglion cyst was caused by his work and the subsequent ganglion cyst excision was necessary.

The ALJ awarded claimant TTD, stating:

Under the factual situation presented herein, claimant testified unrefutedly he was required to resign his position, due to the harassment that he was receiving at the hands of his former employer. In the absence of any evidence to the contrary, it appears that claimant was constructively fired from his position. Accordingly, and based upon the foregoing, temporary total disability benefits are herein awarded

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<sup>5</sup> Parmar Depo. at 13.

<sup>6</sup> Dr. Parmar testified this surgery removes the four bones in the first row of bones closest to the wrist.

<sup>7</sup> Parmar Depo., Cl. Ex. 2 at 2.

since claimant is under restrictions, and not currently working at the rate of \$464.39 per week commencing on the date of filing E-3, January 7, 2015. . . .<sup>8</sup>

At the October 6, 2015, preliminary hearing, the ALJ indicated claimant was requesting four things, including payment of Dr. Parmar's deposition fee and \$500 in unauthorized medical expenses for Dr. Ketchum's opinion. With regard to unauthorized medical benefits, the ALJ ruled:

Further, pursuant to the provisions of [K.A.R. 51-9-6], the fee of a neutral physician giving such testimony may be assessed. Under the facts herein, claimant was required to take the deposition of Dr. Parmar to establish his claim. Accordingly, it is specifically found that the \$500.00 on the cost [assessed] by Dr. Parmar against the claimant should be reimbursed by the Respondent/Insurance Carrier. Additionally, to the \$500.00 unauthorized medical expenses as set forth in the statement of account, Claimant's Exhibit #2 provided by Dr. Lynn D. Ketchum, is ordered paid by the Respondent/Insurance Carrier.<sup>9</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>10</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>11</sup>

In its brief, respondent acknowledged claimant sustained a significant traumatic accident at work and that all the physicians indicated claimant needs additional surgery. Respondent also conceded that Dr. Parmar indicated claimant's wrist had some damage as a result of his work accident and the purpose of surgery was to reduce pain that claimant did not have before his fall. Respondent asserts claimant's accident is not the prevailing factor causing his right wrist injury and need for surgery. Respondent also cites K.S.A. 2011 Supp. 44-508(f)(2), which states:

An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

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<sup>8</sup> ALJ Order at 3.

<sup>9</sup> *Id.*

<sup>10</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>11</sup> K.S.A. 2011 Supp. 44-508(h).

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

In support of his position, claimant cites *Le*.<sup>12</sup> Ms. Le had preexisting, but asymptomatic osteoporosis, fell at work and sustained a T10 vertebral fracture. The fracture healed, but Ms. Le continued to suffer pain which prevented her from returning to work. The Board concluded Ms. Le was not permanently and totally disabled and limited her award to a 15 percent permanent partial general disability and authorized future medical treatment only for the fracture. The Board concluded claimant's inability to work was due to her preexisting osteoporosis, based on Dr. Ciccarelli's opinion.

The Kansas Court of Appeals reversed and noted the issue was "whether Le's fall and the resulting fracture were the prevailing factor causing Le's 'resulting disability or impairment' under K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii)."<sup>13</sup> The Court cited several Board orders that had interpreted K.S.A. 2011 Supp. 44-508(f)(2) to mean that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable despite the claimant also having sustained an aggravation of a preexisting condition.

Prior to her work accident, there was no indication Ms. Le suffered from chronic pain, although she suffered from severe osteoporosis at the time. The Kansas Court of Appeals, in *Le*, ruled her chronic pain was due to her fractured T10 vertebra and discounted Dr. Ciccarelli's opinion that her pain was due to her preexisting osteoporosis. This left Dr. Murati's opinion that claimant's compression fracture prevented her from returning to work, an opinion shared by Dr. Johnson. Basically, two of three doctors agreed claimant's inability to work was due to her work injury.

In the present case most, if not all, of the physicians agreed claimant had a preexisting advanced right SLAC wrist and needed surgery. Prior to his work accident, claimant's right wrist was asymptomatic. Claimant's fall caused his preexisting condition to become symptomatic. However, per Dr. Parmar, claimant's fall also caused a ganglion cyst and he may have an undisplaced capitate fracture. Dr. Ketchum indicated claimant's approximate 15-foot fall onto his wrists was enough of a mechanism to cause scapholunate separation to the degree he had. Dr. Nouhan was suspicious claimant might have a right wrist SL ligament tear.

This Board Member finds claimant's work accident did more than solely aggravate his preexisting advanced right SLAC wrist. Admittedly, claimant's preexisting condition became symptomatic, causing him pain. However, claimant's fall at work also caused a

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<sup>12</sup> *Le v. Armour Eckrich Meats*, \_\_\_\_ Kan. App. 2d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_ (2014), *rev. denied* Apr. 29, 2015.

<sup>13</sup> *Id.*

ganglion cyst and likely caused additional right wrist injuries. Dr. Parmar testified the proposed surgery is to alleviate claimant's pain. As indicated above, in *Le*, the Kansas Court of Appeals cited several Board orders wherein the Board or a Board Member found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite the claimant also having an aggravation of a preexisting condition.<sup>14</sup> The undersigned Board Member affirms the ALJ's granting of medical treatment for claimant's right wrist.

The Board does not have jurisdiction to consider the issue of TTD because that is not one of the issues designated in K.S.A. 2011 Supp. 44-534a as a jurisdictional issue. Nor did the ALJ exceed his authority by ordering TTD. Therefore, the undersigned Board Member dismisses respondent's appeal on the issue of TTD.

As noted above, the ALJ ordered respondent to pay Dr. Ketchum's bill as unauthorized medical benefits. Respondent asserts the issue of unauthorized medical benefits was not discussed at the October 6, 2015, preliminary hearing. However, the October 6, 2015, preliminary hearing transcript clearly indicates claimant was requesting unauthorized medical benefits for Dr. Ketchum's bill and the ALJ intended on addressing that issue.

Respondent next contends claimant already used his \$500 in authorized medical benefits because he agreed it would be used for Dr. Nouhan's evaluation and that a payment had been sent to Dr. Nouhan. The undersigned Board Member dismisses respondent's appeal of this issue for lack of jurisdiction. K.S.A. 2011 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."<sup>15</sup>

No evidence was presented at the October 6, 2015, preliminary hearing as to whether respondent paid \$500 to Dr. Nouhan as unauthorized medical benefits. Respondent is required to pay no more than \$500 in unauthorized medical benefits. This Board Member urges the parties to confer in order to resolve this issue.

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<sup>14</sup> See *Folks v. State*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012); *Homan v. U.S.D. # 259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012); *Macintosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012); *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012); and *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

<sup>15</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>16</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>17</sup>

**WHEREFORE**, the undersigned Board Member affirms the October 12, 2015, Preliminary Order, but dismisses for lack of jurisdiction respondent's appeal of the issues of unauthorized medical benefits for Dr. Ketchum's evaluation and claimant's entitlement to temporary total disability benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2016.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: Mark E. Kolich and David A. Slocum, Attorneys for Claimant  
mek@kolichlaw.com; justjulie1@yahoo.com; das@kolichlaw.com

Bret C. Owen, Attorney for Respondent and its Insurance Carrier  
boc@boc.kscoxmail.com

Steven J. Howard, Administrative Law Judge

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<sup>16</sup> K.S.A. 2014 Supp. 44-534a.

<sup>17</sup> K.S.A. 2014 Supp. 44-555c(j).